

2002

State of Utah v. Mario A. Soto : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH)
)
 Plaintiff/Appellant,)
)
 v.) **Case No. 20020328**
)
 MARIO A. SOTO,)
)
 Defendant/Appellee)

**RESPONSE TO AN ORDER DISMISSING A CHARGE OF
DRIVING UNDER THE INFLUENCE OF ALCOHOL, A THIRD
DEGREE FELONY UPON ENHANCEMENTS WITH PRIORS
IN VIOLATION OF UTAH CODE ANN. SEC. 41-6-44(SUPP
2001)IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND
FOR EMERY COUNTY, STATE OF UTAH, THE HONORABLE
BRUCE K. HALLIDAY, PRESIDING.**

BRIEF OF APPELLEE

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FILED
Utah Court of Appeals

JAN 16 2003

**Paulette Stagg
Clerk of the Court**

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UTAH COURT OF APPEALS

STATE OF UTAH,)	
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)	Appellate Court No 20020328
v.)	
)	JUDGE BRUCE K. HALLIDAY
MARIO A. SOTO)	
Defendant/Appellee,)	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

The State appealed from the decision of Judge Bruce K. Halliday granting Defendant's Motion to Dismiss a charge of Driving Under the Influence of Alcohol, a third degree felony, enhanced with priors, alleged to be in violation of Utah Code Annotated, Sec. 41-6-44 (Supp. 2001 (R. 1))

This Court has jurisdiction to consider this appeal pursuant to Utah Code Annotated Sec. 78-2a-3(2)(e) Supp. 2002.

STATEMENT OF ISSUES ON APPEAL

1. Can the State of Utah charge Defendant with a third degree felony pursuant to Utah Code Ann. Sec 41-6-44(6)(a) (2001) based on previous violations which occurred on May 20, 1991, March 6, 1993, and July 22, 1995, without violating the provisions of Utah Code Ann. Sec. 68-3-3, and the *ex post facto* and due process provisions of the United States Constitution, and the Constitution of Utah?

2. Where along the time line does the "ten year" the amendment of UCA 1-6-44 (6)(a)(i) (2001) begin and end ?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Utah Code Annotated. Sec 41-6-44 (6)(a) (1990 to 2001) Full text @ Addendum

Utah Code Annotated. Sec. 68-3-3.:

No part of these revised statutes is retroactive, unless expressly so declared.

United States Constitution. Art. 1, Sec. 10

No state shall ... pass any *ex post facto* law.

Utah Constitution. Art. 1, Sec. 18:

No bill of attainder, *ex post facto* law, or law impairing the obligation of contract shall be passed.

STATEMENT OF THE CASE

Defendant stipulates to the Statement of the Case as stated by the State. (AppBrf.P. 2-3)

STATEMENT OF FACTS

The parties stipulated to the facts for the purposes of the motion to dismiss Defendant stipulates to the State's Statement of the Facts, with the following exceptions:

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STATE OF UTAH,)	
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)	Appellate Court No 20020328
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STATEMENT OF FACTS

The parties stipulated to the facts for the purposes of the motion to dismiss Defendant stipulates to the State’s Statement of the Facts, with the following exceptions:

1. Defendant disagrees with the State's characterization of the 2001 amendment to the DUI statute as "within the ten years immediately preceding the charged offense". When, where and whether the "ten year" amendment applies is the underlying issue in this case.
2. The violation dates and conviction dates of Defendant's prior DUI offenses are as follows:

Violation date:	Conviction date:
May 21, 1991	October 8, 1991
March 6, 1993	March 23, 1993
July 22, 1995	March 6, 1996.

(R. 1, 32, 44-45, 75; R. 97;5-6)

SUMMARY OF ARGUMENT

The State argues that the prior two (2) DUI convictions needed to enhance the DUI charge in this case are prior DUI convictions "within the ten years immediately preceding the charged offense". (AppBrf P. 4, L. 5)

Defendant argues that the State can use only those violations committed after July 1, 1996, on the grounds and for the reasons that prior to July 1, 1996, the DUI laws provided for DUI penalties that included only Class B and Class A misdemeanor, The 1996 DUI law was the first DUI statute in Utah to provide that a DUI is a third degree felony.

Defendant argues that the use of violations and convictions prior to July 1, 1996, is a violation of UCA 68-3-3, and the *ex post facto* and due process prohibitions of the United States Constitution and the Constitution of Utah.

ANALYSIS AND ARGUMENT

RETROACTIVE APPLICATION OF THE STATUTE

The State argues that *ex post facto* principles are not implicated in this case because the 2001 DUI amendment does not apply retroactively, that the statute does not violate Constitutional *ex post facto* clauses, and is properly applied to enhance Defendant's charge to a third degree felony.

The State does not acknowledge that UCA Sec 68-3-3 prohibits retroactive application of a statute.

Black's Law Dictionary (1951) defines a "retroactive statute" as a

"statute which creates a new obligation on transactions or considerations already past or destroys or impairs vested rights."

Black's Law Dictionary (1951) defines a "retrospective law" as

(A) law which looks backward or contemplates the past; on which is made to affect acts or facts occurring or rights occurring before it came into force. Every statute which takes away or impairs vested rights or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already past. See *ex post facto*.

All of Defendant's prior violations and convictions occurred prior to July 1, 1996, and when committed were charged as misdemeanors. The Utah Legislature had not passed a law or amended a statute providing for a DUI to become a felony. No one, including this Defendant, knew or could have known that the Legislature would at any time amend the DUI code to provide for an enhancement to a third degree felony based on prior misdemeanor violations and convictions. Because the law had not yet been amended, Defendant had no notice at the time of his previous convictions that the prior convictions would, at a later date, become the basis of a third degree felony charge.

NOTICE TO DEFENDANT

In 1954, Justice Warren wrote the opinion in the case of United States v. Harris, 347 U.S. 612, and set forth what has become a basic tenant of criminal law.

The constitutional requirement of definitiveness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his conduct is forbidden by statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. *Id* at 617.

In 1964, Justice Brennen quoted the Harris case with favor in the case of Bouie v. City of Columbia, 347 U.S. 347, as follows:

The basic principle that a criminal statute must give fair warning of the conduct that makes it a crime has often been recognized by this Court.

Thus we have struck down a state criminal statute under the Due Process Clause where it was not sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to it's penalties.

We have recognized in such cases that a statute which either forbids or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. violates the first essential of due process of of law. *Id*.

In the case at bar, Defendant is one of those defendants who is subject to the law.

All of Defendant's prior violations and convictions occurred prior to the enactment of the 1996 amendments which made a third DUI a third degree felony. In his prior cases, Defendant had been charged with misdemeanors, and appeared in Court in the Justice Court. No one advised Defendant at any time during his previous court appearances in the Justice Court that the misdemeanor DUI violations could and would be used at a later date to enhance his charge to a third degree felony.

Justice Warren in Harris refers to “a person of ordinary intelligence” and the need to give the “person of ordinary intelligence” “fair notice that his conduct is forbidden by statute”.

Defendant in the case at bar could believe that he were to be arrested for another DUI that he would again go to the Justice Court and be subject to the same penalties he had incurred before. Defendant had no information to the contrary..

The fact that this appeal is in process is clear evidence that the 2001 DUI statute is “so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.”

If trained lawyers have differing opinions regarding their interpretation of the 2001 DUI statute, can we reasonably expect that a lay person with no legal training could read the DUI statute of 2001 and determine with any degree of certainty that his prior violations and convictions could be used as the basis for a third degree felony charge?

The State asserts that Defendant was arrested for the present DUI “approximately ten weeks after the last amendment” to the 2001 DUI statute. AppBrf P 7 L 6.

The State asserts:

“there was no *ex post facto* violation because the amendment involved an enhancement that applied prospectively and served only to punish the offense defendant committed after the amendment became effective.” AppBrf ,P 7

The State, in its analysis, fails to take into account that without the prior violations and convictions, the third degree felony charge could not be charged. The enhancement to a third degree felony depends entirely on the legitimacy of the prior violations and convictions.

The State asserts that “there was no *ex post facto* violation because the amendment involved an enhancement that applied prospectively and served only to punish the offense defendant committed *after* the amendment became effective.” This assertion is invalid on its face. Had not the State relied on the prior violations, there would be no felony charge.

The State appears to rely on the old adage that “ignorance of the law is no excuse.” But, in this case, this Defendant is in a particular group of defendants who, because of their previous violations and convictions, are subject to an enhanced charge and, therefore, in need of the knowledge that another DUI violation could be charged as a felony.

Defendant is one of those particular persons who is subject to the law and in need of the knowledge of what conduct on his part will render him liable to the penalties of the law. Defendant did not have knowledge of the 2001 DUI law, and even if he had read the statute, he probably would not have been able to ascertain the meaning of the statute or its possible application to him. Trained lawyers prosecuting this case interpret the application of the law from opposite positions.

STATUTORY CONSTRUCTION OF THE LAW

UCA Sec. 68-3-3 provides: “No part of these revised statutes is retroactive, unless expressly so declared.”

The retroactive provisions of this statute can be avoided if this Court finds that the 2001 amendments to the DUI statute providing for a ten (10) year time frame is simply an extension of the previous six (6) year time frame which began on July 1, 1996.

The 2001 DUI amendments do not contain any language which could be interpreted as being expressly declared as retroactive.

A review of the DUI laws from 1990 to 2001 is necessary to interpret the meaning of the 2001 DUI law amendment. From 1990 to 1995, all DUI laws were misdemeanors. In 1996, the DUI law was amended and for the first time the law provided for a third degree felony charge for DUI, based on prior DUI violations and convictions, i.e. three prior convictions committed after April 23, 1990, or two prior convictions for violations committed after July 1, 1996.

The language of the DUI statute of 1996 remained the same in 1997 and 1998, including convictions are for violations committed after April 30, 1990, and for violations committed after July 1, 1996.

In 1999, the language of the statute, UCA 41-6-44(6)(a) changed, and reads as follows:

a third or subsequent conviction for a violation committed within six years of two or more prior convictions under this section is a third degree felony.

The language of the 2000 DUI statute is the same as the 1999 statute.

The language of the 2001 DUI statute, at issue here, was changed again, as follows:

- (6)(a) A conviction for a violation of Subsection (2) is a third degree felony if it is committed
 - (i) within 10 years of two or more previous convictions under this section..
 - (ii) at any time after a conviction of
 - (A) automobile homicide...
 - (B) a felony violation under this section committed after July 1, 2001.

Of particular note is the fact that neither the 1999 DUI statute, the 2000 DUI statute, or the 2001 DUI has any language regarding “convictions for violations committed” after a certain date. The previous language from the 1996 statute referred to convictions for violations committed after April 23, 1990 or July 1, 1996.

The 2001 DUI statute at issue here does not contain language referring to convictions for violations of the DUI statute after a certain date. The logical solution is to look back at the previous statutes and determine the status of the law at the time of the last reference to “convictions for violations committed” after a certain date.

The 1996, 1997, and 1998 DUI statutes are identical, and include:

(ii) three prior convictions are for violations committed after April 23, 1990, or two prior convictions are for violations committed after July 1, 1996.

Of note is the fact that at no time during this litigation has the State or the Defendant attempted to use the April 23, 1990, date as a factor. Obviously, that date would be subject to the *ex post facto* and due process prohibitions as outlined in this brief, and specifically for the reason that all DUI violations and convictions were for misdemeanors, and none of the convictions for DUI during the time period prior to July 1, 1996 could have been used to enhance the charge in this case to a felony level.

The change to a third degree felony came on July 1, 1996, and the 1996 DUI amendments specifically provided for the “two prior convictions are for violations after July 1, 1996”.

The fact that the 1999, 2000, and 2001 DUI statutes do not include the “two prior convictions ..for violations after July 1, 1996” does not mean that any violation at any time can now be used to enhance the charge to a third degree felony. The July 1, 1996 was set in the Code in July of 1996, and will remain in the Code until amended. The violation date and conviction date are both crucial elements of the DUI statute for the purposes of determining under which law a defendant will be prosecuted, and whether the statute of limitations is still in play or has expired.

The most recent amendment to the DUI Code pertaining to the date of the violation and the conviction is July 1, 1996, the same date that the DUI statute was amended to a third degree felony. The legislature provided that the statute would be prospective because the charge of a third degree felony could only be brought for violations and convictions after July 1, 1996.

All of the DUI statutes from 1990 to 2000 refer to either the violation or the conviction being within “six years”, and identify the time period within which a defendant will be subject to the statute.

The 2001 DUI amendment changed the time period from six years to ten years.

The State argues as follows:

However, the class B misdemeanor was subject to enhancement to a third degree felony when the accused had two or more prior DUI convictions within the ten years immediately preceding the charged offense. AppBrf P. 4

The State is in error. All of the DUI laws reviewed here refer to certain and specific dates at which time the statute becomes effective, a time period within which violations and/or convictions can be considered, and a time period within which the charge may be brought before the statute of limitations expires. Only in the case of the expiration of the statute of limitations does the date of the criminal deed become the relevant factor. No statute makes a crime a crime by referencing backwards to the last violation for the same crime as the time frame for determining the present charge.

The fact that the 2001 DUI law does not refer to the July 1, 1996 date as the date after which violations occurred within the six year period, does not erase the July 1, 1996 date. The legislature may have been attempting, by the noticeable absence of the July 1, 1996, date after which violations and convictions can be charged to mean that the State can now resurrect old DUI violations and convictions prior to 1996 will not work. To do so would be to allow all old DUI violations and convictions to be resurrected retroactively for years prior to 1996, a result that is not plausible in view of the *ex post facto* prohibitions.

The 2001 DUI statute amended the six year time frame to a ten year time frame. The 2002 statute does not read “the last ten years”, and cannot apply to the last 10 years without violating the *ex post facto* prohibitions.

The 2001 DUI statute amended the six year provision and replaced it with a ten year provision. The ten year provision then operates in the same manner as the six year provision. The six year provision came into law in the 1996 DUI statute, on July 1, 1996, at the same time the law was changed to allow DUI enhancement to a third felony, based on prior violations and convictions.

The ten year change in the 2001 DUI law replaces the six year provision previously enacted. The July 1, 1996 statute provided for a third degree felony based on two or more prior violations and convictions within six years and is still good law even with the ten year amendment.

But, where does the new ten year amendment fit?

Defendant argues that the ten year amendment fits into the statute exactly where the six year amendment began, i.e. on July 1, 1996, and continuing prospectively for the next ten years.

Defendant argues that by this construction of the DUI statutes from 1990 to 2001, the statute is Constitutionally sound and not in violation of the provisions of UCA Sec. 68-3-3

EX POST FACTO APPLICATION

Defendant argues that the use of prior violations and convictions which occurred prior to July 1, 1996, on the grounds and for the reasons that prior to July 1, 1996, all prior violations and convictions were misdemeanors. No one could foresee or knew or could have known that on July 1, 1996, that a third DUI could be charged, not only as a misdemeanor, but as a third degree felony. The application of prior DUI convictions prior to July 1, 1996, are *ex post facto*.

Black's Law Dictionary (4th Edition, 1957) (P 662.) defines *ex post facto*:

A law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences, or relations of such fact or deed.

In the case of Weaver v. Graham, 450 U.S. 24, the United States Supreme Court held:

For a criminal or penal law to be *ex post facto*, it must be retrospective, that it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.

All prior violations of this Defendant occurred prior to July 1, 1996, the date the amendments to the DUI law changed the offense from a misdemeanor to a third degree felony. Prior to that time, the penalties for DUI were limited to misdemeanors.

The 1996 DUI law required two prior DUI violations to enhance the charge to a third degree felony and specifically for violations and convictions committed after July 1, 1996. The 1996 increased the charge against a defendant from a misdemeanor to a third degree felony.

If the prior DUI convictions of this defendant, all of which occurred prior to the change in the 1996 DUI law, are used as enhancements to increase the charge, that application would be an *ex post facto* violation. The prior DUI convictions were “events occurring before its enactment”, i.e. prior to the enactment of the 1996 DUI law. .

The 1996 DUI law, using prior misdemeanor convictions, if allowed to be applied to this Defendant, would definitely be a disadvantage, in that it could subject him to a third degree felony charge, based on prior misdemeanor violations and convictions..

LIMITATION OF ACTIONS

The State dismisses the case of State v. Lusk, as not relevant to the application of a statute of limitations which had been amended subsequent to commission of the crime being prosecuted. (2001 UT 102 at 25-26).

The State quotes the position universally held by appellate courts that a statutory amendment enlarging a statute of limitations will extend the limitations period applicable to a crime already committed only if the amendment becomes effective before the previously applicable of limitations has run, thereby barring prosecution of the crime.

The four year limitation period in Lusk was amended to provide for a longer period, and the amendment could not resurrect the State's ability to prosecute Lusk for the crime."

The State contends that because Defendant was arrested for the present offense after the 2001 DUI became law that the State can prosecute him for a third degree felony under the 2001 DUI law.

The State fails to take into account that without the prior violations and convictions, all of which were committed prior to the enactment of the 2001 law, the State would not have the enhancements necessary to elevate this offense to a third degree felony. It is the prior violations and convictions that are the essence of this charge. It is the prior violations, committed prior to the enactment of the 2001 DUI law, that are the violations on which the statute of limitations has run. The 2001 DUI law did not and cannot resurrect those prior violations and convictions.

The trial court analyzed and addressed this issue as follows:

The Court concludes that as to this particular defendant the enhancement limitation period of the prior statute had expired before the effective date of the the new legislation and no enlargement of the limitation period as to this defendant is allowable. Therefore, the prosecution is precluded from pursuing a third degree felony under the facts of this case. Trial Court Ruling P. 3

CONCLUSION

Defendant respectfully requests that this Court uphold the Order of the trial court, enter a judgment in favor of Defendant, and order that the case against Defendant be dismissed.

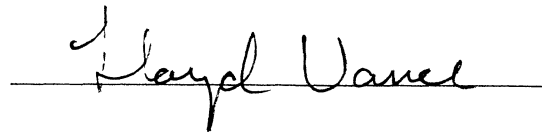
RESPECTFULLY SUBMITTED on this 16 day of January, 2003.


MARGRET SIDWELL TAYLOR
Attorney for Appellee

Certificate of Service

I hereby certify that on this 16 day of January, 2003, I caused to be mailed two true and correct copies of the above and foregoing Brief of Appellee, postage prepaid, and addressed as follows:

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ADDENDUM
DUI STATUTES FROM 1990 TO 2001

UCA 41-6-44 (1990)

- (6)(a) A third or subsequent conviction within six years under this section ...is a
- (i) class B misdemeanor if one or both of the prior convictions is for an offense committed prior to April 23, 1990; and
 - (ii) class A misdemeanor if both of the prior convictions are for offenses committed after April 23, 1990.

UCA 41-6-44 (1991)

- (6) (a) A third or subsequent conviction within six years of two prior violations under this section... is a:
- (i) class B misdemeanor except as provided in Subsections (6) (a) (ii) and (7); and
 - (ii) class A misdemeanor if both of the prior convictions are for violations committed after April 23, 1990.

UCA 41-6-44 (1992)

- (6) (a) A third conviction for a violation committed within six years of two prior violations under this section...is a:
- (i) class B misdemeanor except as provided in Subsections (6) (a) (ii) and (7); and
 - (ii) class A misdemeanor if both of the prior convictions are for violations committed after April 23, 1990.

UCA 41-6-44 (1993)

- (6) (a) A third conviction for a violation committed within six years of two prior violations under this section is a:
- (i) class B misdemeanor except as provided in Subsections (ii) and (7); and
 - (ii) class A misdemeanor if both of the prior convictions are for violations committed after April 23, 1990.

UCA 41-6-44 (1994)

- (6) (a) A third conviction for a violation committed within six years of two prior violations under this section is a:
- (i) class B misdemeanor except as provided in Subsections (ii) and (7);
 - and
 - (ii) class A misdemeanor if both of the prior convictions are for violations committed after April 23, 1990.

UCA 41-6-44 (1995)

- (6) (a) A third conviction for a violation committed within six years of two prior violations under this section is a:
- (i) class B misdemeanor except as provided in Subsections (ii) and (7);
 - and
 - (ii) class A misdemeanor if both of the prior convictions are for violations committed after April 23, 1990.

UCA 41-6-44 (1996)

- (6) (a) A third or subsequent conviction for a violation committed within six years of two or more prior convictions under this section is a:
- (i) class B misdemeanor except as provided in Subsection (ii) ; and
 - (ii) third degree felony if at least:
 - (A) three prior convictions are for violations committed after April 23, 1990; or
 - (B) two prior convictions are for violations committed after July 1, 1996.

UCA 41-6-44 (1997)

- (6) (a) A third or subsequent conviction for a violation committed within six years of two or more prior convictions under this section is a:
- (i) class B misdemeanor except as provided in Subsection (6) (a) (ii) ;
 - and
 - (ii) third degree felony if at least:
 - (A) three prior convictions are for violations committed after April 23, 1990; or
 - (B) two prior convictions are for violations committed after July 1, 1996.

3UCA 41-6-44 (1998)

- (6) (a) A third or subsequent conviction for a violation committed within six years of two or more prior convictions under this section is a:
- (i) class B misdemeanor except as provided in Subsection (6) (a) (ii) ;
 - and
 - (ii) third degree felony if at least:
 - (A) three prior convictions are for violations committed after April 23, 1990; or
 - (B) two prior convictions are for violations committed after July 1, 1996.

UCA 41-6-44 (1999)

- (6) (a) A third or subsequent conviction for a violation committed within six years of two or more prior convictions under this section is a third degree felony.

UCA 41-6-44 (2000)

- (6) (a) A third or subsequent conviction for a violation committed within six years of two or more prior convictions under this section is a third degree felony.

UCA 41-6-44 (2001)

- (6) (a) A conviction for a violation of Subsection (2) is a third degree felony if it is committed:
- (i) within 10 years of two or more prior convictions under this section; or
 - (ii) at any time after a conviction of:
 - (A) automobile homicide under.....
 - (B) a felony violation under this section that is committed after July 1, 2001.